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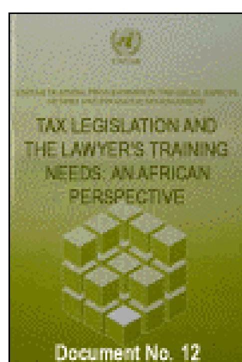
Tax Legislation and the Lawyer's Training Needs: An African Perspective

Paper written following a UNITAR Sub-Regional Workshop on Legislative Drafting for African Lawyers (Kampala, Uganda 22 May to 2 June 2000)



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PREFACE

This paper follows a Joint UNITAR/International Law Institute Seminar entitled Legislative Drafting II for African lawyers held in Kampala, Uganda between May 22 and June 2, 2000.

This seminar was addressed to 23 officials from Angola, Botswana, Ghana, Kenya, Malawi, Namibia, Rwanda, South Africa, Tanzania, Uganda and Zimbabwe who mainly came from the Ministries of Finance and the Attorney-General's Chambers from their respective countries. The seminar was unique in that it brought together the same participants for a second session on Legislative Drafting (in total, four weeks of training).

This workshop aimed specifically at sharpening the analytical skills of participants in as far as Legislative Drafting is concerned. Practical exercises helped participants appreciate the intricacies of textual amendments in legislative drafting. The area of Tax Legislation was dealt with in some degree of detail as part of this workshop. Government officials from Africa considered this an area of primary relevance in financial management issues and in need of dire support in as far as training of lawyers is concerned. This booklet presents a chapter provoking discussion and challenging development assistance agencies and donors in general to channel more funding into training of lawyers in Legislative Drafting in general and Tax Legislation in particular.

Ms. Florence N. Dollo, the author of this chapter, is a lawyer with formal training in and many years of experience in Legislative Drafting issues. We thank her for working with UNITAR on this project.

We hope that this paper will be useful as well as challenging to the readers.

Marcel A. Boisard
Executive Director of UNITAR

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TAX LEGISLATION AND THE LAWYER'S TRAINING NEEDS – AN AFRICAN PERSPECTIVE

INTRODUCTION

Laws are a fundamental and unique resource of government. Without Acts of Parliament, force, personal preferences or momentary whim would justify the actions of government. Without laws, citizens would have no protection against arbitrary authority, no entitlement to social benefits, and no obligation to pay taxes. Without laws, civil servants would have no authority to act, or procedures to follow. One of the characteristics of legislation is that it is empowering, that is it gives a public body the power to carry out tasks which the legislation also imposes upon the public body.

Part of the function of Parliament is to make laws, which it does by enacting statutes. These laws impose obligations on citizens, and obedience to those obligations is enforced by the courts. The courts, therefore, recognise as law and accord primary to those measures which Parliament passes as Acts.

Tax Legislations impose obligations on citizens to pay tax and failure to do so is counteracted by sanctions. Therefore it is important that the citizen should be able to ascertain the law by reading what the draftsperson and Parliament has laid down as law. Where tax provisions are ambiguous the court is obliged to decide in favour of the tax payer thereby frustrating the purpose for the legislation. This paper further elucidates on issues pertaining to tax legislations.

TAX LEGISLATION, ITS NATURE AND ENFORCEMENT

Taxes have existed virtually as long as there have been organised governments. The Bible records instances when people were expected to pay taxes. During Jesus Christ's life ministry tax collection was taking place. One recalls the story of Zacchaeus, a chief tax collector who took Jesus to his home. People considered Zacchaeus a sinner (probably because he was a tax collector) but the Lord accepted him. And queried whether people should pay tax or not Jesus replied "Give to Caesar what is Caesar's and to God what is God's".[1] Further, in Romans 13:1-6 Paul said:

> **"Everyone must submit himself to governing authorities, for there is no authority except that which God has established…Therefore it is necessary to submit to the authorities not only because of possible punishment but also because of conscience. This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. Give everyone what you owe him. If you owe taxes, pay taxes, if revenue, then revenue…."**

[1] See Luke 20:20-26

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Most transfers of money from one individual to another are voluntary. But taxation is compulsory for those who are eligible to pay tax. In Africa, wherever there was organised government, the subjects were required to pay taxes, which were in kind.[2] That was before monetary transactions became the norm. With colonisation came the introduction of legislations that required people to pay taxes.

Government needs money for running the costs of government. It follows therefore that payment of tax is a civil responsibility. It is a citizen's contribution towards the development of the nation. But generally, people detest taxes. All efforts are made by some to avoid taxes. Lord Denning said,

> **"…some wicked people…keep two sets of books: one for themselves to use; the other to be shown to the revenue. Those who make out two invoices. One for the customer. The other to be shown to the taxman. Those who enter into fictitious transactions and write them into their books as genuine. Those who show losses when they have in fact made gains. In the tax evasion pool, there are some big fish who do not stop at tax avoidance. They resort to frauds of a large scale. I can see that if the legislation were confined – or could be confined - to people of that sort, it would be supported by all honest citizens. Those who defraud the revenue in this way are parasites who suck out the life – blood of our society. The trouble is that the legislation is drawn so widely that in some hands it might be an instrument of oppression."[3]**

Pursuant to the foregoing, legislation is required to determine tax payable and by whom it is payable. A "tax" has been defined as a charge by the Government on the income of an individual, corporation or trust, as well as the value of an estate gift.[4] A "tax" has also been defined as any contribution imposed by Government upon individuals for the use and services of the state whether under the name toll, custom, excise, tribute, tallage, gabel, impost, duty, subsidy but in which its essential characteristics is not a debt.[5] But the Value Added Tax Statute 1996 of Uganda introduces the aspect of tax as a debt due to the Government. Section 41(1) of the Statute provides that tax due and payable under the statute is a debt due to the Government and is payable to the Commissioner General by the person specified in Section 6. The persons liable to pay tax under Section 6 are suppliers of taxable supply, importers of goods and recipients of imported services.

But who can impose tax? This was the issue in Kenyan case of *Nyali Ld* v *Attorney-General*[6] where Nyali Ld built a pontoon bridge linking the mainland at Nyali with the island of Mombosa, both in Kenya.

The bridge was built under an agreement of October 9, 1929 with the Government of Kenya, which entitled the company to charge tools for "(a) all passenger vehicles (persons limited to six)…. (b) foot passengers or persons in excess of six in number

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[2] That is by providing goods or services
[3] See *Regina* v *I.R.C. Ex p. Rossminster* [1980] A.C. at pp. 971-972
[4] Black's Law Dictionary, p. 1457
[5] *Ibid*
[6] (1956) 1 Q.B. 1

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"travelling in any vehicle" but provided for exemptions in respect of "military on duty or their equipment, luggage or transport"

At page 13 of the report, Lord Denning said,

> **"In former times there were many cases where a man set up a ferry or made a bridge to cross a river or an arm of the sea. It was usually done to connect two highways so as to save a long journey round. In such a case, it is well settled that the owner of the ferry or the bridge cannot of his own head impose a toll upon the people who use it. The reason is because it is a thing of public benefit and use; and it ought, therefore, to be under public regulation. He must get lawful authority to levy a toll; and the only authority recognised for this purpose is a crown grant of a franchise of tolls, or an Act of Parliament. The toll charged must not exceed the amount specified in the crown grant or in the statute."**

It is clear from the foregoing quotation that authority to levy tax should be derived from an Act of Parliament. The all important matter of imposing tax should be contained in primary legislation and not left to subsidiary, delegated or secondary regulations. If the later is done, it may lead to abuse, excessive taxation or imposing taxes which are *ultra vires* the parent Act. In the case of *Woolwich Equitable Building Society* v *IRC*[7] the House of Lords considered the Finance Act 1985 (England) which included sections enabling the Inland Revenue to make regulations for the payment by building societies of tax on 'such sums as may be determined in accordance with regulations'. The Act went on to provide that any such regulation might contain 'such incidental and consequential provisions as appear to the Board to be appropriate'. Why it was thought appropriate to leave the important matter of imposing tax on building societies to secondary rather than primary legislation in this way remains a mystery. But, whatever the explanation the experiment was a total disaster and resulted in the Revenue producing some regulations in respect of a particular period of assessment which were so hopelessly flawed that the House of Lords found itself compelled to declare them void as being *ultra vires*.

Every taxing statute has provisions for enforcement in case of failure to pay tax. For instance section 41(4) of Value Added Tax Statute 1996 (Uganda) provides –

> **"If a person fails to pay tax when it is due and payable, the Commissioner-General may file, with a court of competent jurisdiction, a statement certified by the Commissioner-General setting forth the amount of the tax due, and that statement shall be treated for all purposes as a civil judgment lawfully given in that court in favour of the Commissioner General for a debt in the amount set forth."**

It follows that after obtaining judgment under the above provision, the Commissioner-General can have it executed like a distress for rent.

[7] (1991) 4 All ER 92

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Another way of recovering tax due and payable is through seizure of goods. This is also provided for under Section 44(1) of the Value Added Tax Statute 1996 (Uganda). The provision states that,

> **"The Commissioner-General may seize any goods in respect of which he has reasonable grounds to believe that tax that is due and payable in respect of the supply or import of those goods has not been, or will not be paid".**

The above provision could lead to abuse of power and indeed untold suffering to tax payers.

How should the phrase "reasonable grounds to believe" be construed?

It is the traditional right and duty of the judges to protect individuals from abuse of power by the executive. 'It is not enough for an officer to swear that he had reasonable cause to believe – he must state the facts on which his belief was based so that the court can judge whether or not his belief was reasonable.[8] Consequently, the court must construe the phrase "reasonable grounds to believe" objectively and not subjectively. The Commissioner-General must state that tax due and payable "in respect of the supply or import of those goods has not been, or will not be, paid."

Another problematic phrase here is "will not be paid". How would the Commissioner-General know that tax will not be paid? This calls for an objective approach to construction of the phrase. The grounds for believe must be stated otherwise the provision would lead to arbitrary action.

In the *Rossminster Case*[9] the court was concerned with the construction and interpretation of provisions giving powers of search and seizure of documents in connection with tax frauds. Armed with search warrants, officials from Inland Revenue accompanied by police officers collected a mass of documents from directors' homes and offices of Rossminster Ltd. Mr. Plummer was the chartered accountant of the company. At Mr. Plummer's home the revenue officials took building society passbooks, his children's cheque books and passports. They took his daughter's school report. They went to his bedroom, opened a suitcase, and removed a bundle of papers belonging to his mother. They searched the house. They took personal papers of his wife.

One wonders what a child's school report has got to do with tax frauds in a company where the child's father works. Indeed, 'it was a military style operation'.[10]

In the House of Lords, Lord Scarman said:

> **"If power exists for officers of the Board of Inland Revenue to enter premises, if necessary by force, at any time of the day or night and then seize and remove any things whatsoever found there which they have reasonable cause to believe may be required as evidence for the purposes of**

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[8] per Browne, L.J in *Reg* v *IRC*, Ex p. Rossminster (1980) A.C. at p. 979
[9] [1980] A.C. 952
[10] per Lord Denning M.R. at page 968

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> **proceedings in respect of any offence or offences involving any form of fraud in connection with, or in relation to, tax, it is the duty of the courts to see that it is not abused; for it is a breath-taking inroad upon the individual's right of privacy and right of property. Important as is the public interest in the detection and punishment of tax frauds, it is not to be compared with the public interest in the right of men and women to be secure in the privacy of their homes, their offices and their papers".**

The courts have a duty to supervise critically or even jealously the legality of any purported exercise of powers of search, and seizure of goods or documents.

The courts are the guardians of the citizens' right to privacy. Although the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour, it is no part of their duty, or power to restrict or impede the working of legislation, even of unpopular legislation. To do so would be to weaken rather than to advance the democratic process.

It is important that people who defraud the revenue should not go free but be found out and brought to justice. But the means adopted to this end should be lawful means. A good end does not justify a bad means. The means must not be such as to offend against the personal freedom, the privacy and the elemental rights of property. It is a constitutional provision in most African countries or common law countries that every man in presumed to be innocent until proved guilty. If a person's premise is to be searched and property seized on suspicion of an offence, it must be done by due process of law. And due process involves that there must be a valid warrant specifying the offence of which the person is suspected and the seizure is limited to those things authorized by the warrant. In a nutshell, the burden is on the draftsperson to draft legislation in such a way that arbitrary powers are not conferred on public officials. The law should ensure that reasons for belief are given where tax evasions are suspected.

Interpretation of Tax Legislations

Parliament makes the laws, the judiciary interpret them. When Parliament legislates, the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. A good draftsperson has to keep abreast with how the courts interpret legislation. That knowledge empowers the draftsperson and enables him or her to draft clearly and express the intention of the sponsoring department or Parliament.

Historically, the courts took a literal approach to revenue statutes to determine legislative intent. The written expression almost exclusively prevailed over legislative intent and purpose. The literal interpretation, coupled with the restrictive interpretation, placed the onus on Parliament to express itself clearly, and if it did not, the benefit of the doubt went to the tax payer.[11]

[11] per Vancise J.A in *Royal Bank of Canada* v *Saskatchevan Power Corporation* 73 D.L.R. 257

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> **"The subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him".**[12]

The above principles governing interpretation of tax or fiscal legislation have been applied in cases in East Africa. For example in *Kanjee Naranjee* v *Income Tax Commissioner*[13] it was held that if the language of a revenue Act is obscure, the tax payer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness, before he is adversely affected. In the Ugandan case of *Alibhai* v *The Commissioner of Income Tax*,[14] the appellant disputed an additional assessment to income tax in respect of the year of income 1957. His appeal to the High Court of Uganda was dismissed.

On appeal to the East African Court of Appeal, the court considered the construction to be put on certain words in Section 22(2) of the East African Income Tax (Management) Act, 1952. The issue was whether the words "in the course of such period" in the passage

> **"and any such shares have in the course of such period, been in fact, freely transferable by the holders to other members of the public"**

were to be construed as meaning "throughout the whole of such period" or "at any time during such period".

It was held that the grammatical construction and ordinary meaning of the words "in the course of such period" in Section 22(2) of the Act are "at any time during such period".

Counsel for the Commissioner conceded that the words could bear this meaning if taken out of their context, but contended that regard must be had to the evil aimed at by the section. That so to construe the words would make nonsense of the Section, and that therefore in the context of the section the words must mean "throughout the whole period".

Sir Alastair Forbes, V-P said,

> **"In my view the construction contended for by Mr. Summerfield, while it is a possible one, is the more strained of the two, and I am of opinion that strong grounds must be shown to induce court to accept it, particularly bearing in mind the fact that the Act is a taxing enactment.**[15]

The Court further held that there was ambiguity in the provisions of Section 22(2) of the Act, which was then construed in favour of the tax payer. The Court of Appeal followed the dictum or maxim of income tax law stated by Lord Simonds in *Scott* v *Russel (Inspector of Taxes)*[16] that 'the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him'.

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[12] per Lord Simonds in *Russel* v *Scott* [1948] A.C. 422 at p. 433
[13] [1964] E.A. 257
[14] [1961] E.A. 610
[15] [1961] E.A. at p. 612
[16] (1948) 2 All E.R. 1

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However, the above maxim does not prevent the court from construing a taxing statute against the subject, where that appears to be the correct interpretation of a provision the meaning of which it may be difficult to understand. Difficulty does not absolve the court from the duty of construing a statute. It is only when the ambiguity remains after the statute has been properly construed that the court is entitled to decide in favour of the taxpayer. Hence legislation must be expressed with clarity.

Where the words of a taxing statute are clear, the courts have construed them basing on their ordinary meaning. In *United Manufacturers Ltd* v *WAFCO Ltd*[17] it was held that a primary liability for the payment of duty is laid on the importer, although payment may be deferred or passed on to someone else.

Furthermore, in the case of *Commissioner of Income Tax* v *Holdings Ltd*[18] the respondent company deducted all its income received from dividends from resident companies from its chargeable income. The Commissioner of Income Tax contended that this was incorrect, and that only the net income from such dividends (that is after deduction of expenses) should have been deducted. The High Court having held against the Commissioner, he appealed. The argument turned on the interpretation of S. 58 (c) of the East African Income Tax (Management) Act, 1958.

It was held that in interpreting the Section the whole Act must be considered in relation to the particular section and especially with reference to the interpretation Section and the methods set out in the Act to arrive at what is chargeable income.

That the general rule is that the taxpayer's business or other ventures are considered together as one. Chargeable income should be arrived at by aggregating all the tax payer's income and then deducting all the expenditure incurred in the production of this income. It was further held that Section 58(c) meant that the entire dividend received from resident companies should be deducted from the chargeable income and not the net dividend income after deducting expenses. So the appeal was dismissed.

It is submitted that in interpretation and construction of tax legislation, the whole Act is read as a whole to ascertain the intention of Parliament and in particular to determine tax payable. In case of ambiguity in the Act, the Act is construed in favour of the subject. A person is not to be deprived of his property (in money terms) through taxation based on ambiguous or vague provisions. This can be likened to criminal cases where the burden of proof is on the prosecution to prove the charge against the accused person beyond any reasonable doubt. And where there is a shadow of doubt, the courts have always construed the matter in favour of the accused to safeguard his or her liberty.

It must not be supposed, however, that the courts encourage legal avoidance of tax. In *Howard de Walden (Lord)* v *C.I.R.* [19] the court stated that,

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[17] [1974] E.A. 233
[18] [1972] E.A. 128
[19] [1942] 1 K.B. 389 at p. 397

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> **"For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders onto those of their fellow subjects. …It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties."**

So the courts have expressed disapproval of the conduct of taxpayers who are parties to highly artificial schemes of tax avoidance and also their professional advisers.[20]

Drafting of Tax Legislations

Time after time, when a judge finds it difficult to interpret a statute he blames the draftsman for it. For example in *Roe* v *Russel*[21] Lord Justice Scrutton said:

> **"I regret that I cannot order the cost to be paid by the draftsman of the Rent Restriction Acts, and the members of the Legislature who passed them, and are responsible for the obscurity of the Acts."**

Consequently, it is the duty of Parliamentary Counsel to try to imagine every possible combination of circumstances to which his or her words might apply and every conceivable misunderstanding or misinterpretation that might be put to them, and to take precautions accordingly. In *Re Castioni*[22] Stephen, J. said that Acts of Parliament may be easy to understand but people continually try to misunderstand them. So he said that

> **"it is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."**

What the law is ought to be clear and plain. It should be expressed in terms that can be easily understood by those who have to apply it. Lord Diplock[23] stated that "absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it."

Suffice to mention that the draftsperson doesn't draft in a vacuum and straight out of his or her head. It is the draftsperson's job as well as his or her misfortune to seek to reduce to writing concepts and ideas fashioned and implanted by somebody else. The Parliamentary Counsel do an immensely important task and do it under almost intolerable pressure; but in the end they merely put into words what their political masters state as their desired object. If the object is itself bizarre or ambiguous, one can hardly be surprised that the result is bizarre or ambiguous.

[20] see Observations of Viscount Simon L.C. in *Latilla* v *C.I.R.* [1943] A.C. 377 at p. 381
[21] (1928) 2 K.B. 117 at p. 130
[22] (1891) 1 Q.B. 167
[23] See *Merkur Island Shipping Corp.* v *Laughton and others* [1983] 2 A.C. 570 at p. 612

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Merkur Island Shipping Corp v *Laughton & others*[24] was an action arising from a trade dispute between the owners and crew of a ship, where members of the International Transport Workers' Federation were sued for damages for losses arising from secondary industrial action in which they had been involved. In deciding whether a trade union was immune from tortious liability, the court had to construe three statutes: The Trade Union and Labour Relations Act 1974, the Trade Union and Labour Relations (Amendment) Act 1976, and the Employment Act 1980. Lord Donaldson MR said:

> **"The judges of this court are all skilled lawyers of very considerable experience, yet it has taken us hours to ascertain what is and what is not 'offside', even with the assistance of highly qualified counsel. This cannot be right. We have had to look at three Acts of Parliament, none intelligible without the other. We have had to consider section 17 of the Act of 1980, which adopts the 'flow' method of Parliamentary draftsmanship, without the benefit of a flow diagram…."**

Then Lord Donaldson MR said

> **"But I do not criticise the draftsman. His instructions may well have left him no option. My plea is that Parliament when legislating in respect of circumstances which directly affect the 'man or woman in the street' or the 'man or woman on the shop floor' should give as high a priority to clarity and simplicity of expression as to refinements of policy. Where possible, statutes, or complete parts of statutes, should not be amended but re-enacted in an amended form so that those concerned can read the rules in a single document. When formulating policy, ministers … should at all times be asking themselves and asking Parliamentary Counsel: 'Is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be so expressed?' Having to ask such questions would no doubt be frustrating for ministers and the legislature generally, but…this is part of the price which has to be paid if the rule of law is to be maintained."**

The above observations are equally applicable to tax legislations. We have observed above that courts construe ambiguous tax provisions in favour of the taxpayer, therefore it is of utmost importance that tax provisions are drafted simply and clearly. But there is a general complaint against tax legislation. It is difficult to understand. The Renton Committee on the Preparation of Legislation reported that

> **"the Federal German Added Value Tax Law of 1967 runs to some 57 pages of print, despite a deliberate effort to keep it short by incorporating the provisions of other laws by reference more than 50 instances (and according to the editors of an English translation it "can hardly be understood without professional advice."**

Driedger[25] confirmed the above comment. He said,

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[24] [1983] 2 A.C. 570
[25] in the Manual for Instructions for Legislative and Legal Writing, Book Six pp. 554-555

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> **"I was in Hamburg in the foreign service when the value added tax was brought in there. We were on the federal Government's mailing list for some matters including taxation. We were literally flooded with documents, and built up an enormous file. Despite the fact that I was a lawyer and that I was familiar with the language, I never understood the tax".**

One of the reasons why tax legislations are complicated and difficult to comprehend is that many provisions are prose descriptions of a mathematical process. For instance a provision in an Income Tax Act provides:

> **"(6) where a corporation is or has been a personal corporation, notwithstanding paragraph (b) of subsection (1), its tax-paid undistributed income at a specified time is the amount that it would be according to the terms of Paragraph (b) of subsection (1) plus the amount by which**
>
> a. the aggregate of the incomes deemed under section 67 to have been distributed to its shareholders while it was a personal corporation prior to that time, exceeds
>
> b. the aggregate of dividends received from the corporation prior to that time and not included, by virtue of section 67, in computing the incomes of the shareholders by whom they were received."

The above provision is mind-teasing. It is recommended that to avoid ambiguity it is necessary to chop the provision up into paragraphs, subparagraphs, clauses and subclauses, with one or two words often going to the outer or inner margin as one line. It is even simpler to set up a mathematical formula, followed by what each letter or symbol represents. So the above provision could be drafted thus:

> **"(6) where a corporation is or has been a personal corporation, notwithstanding paragraph (b) of subsection (1), its tax-paid undistributed income at a specified time is**

$A = (B - C)$

where

A = the amount it would be accorded under paragraph (1)(b),

B = the aggregate of the incomes deemed under Section 67 to have been distributed to its shareholders while it was a personal corporation prior to that time, and

C = the aggregate of dividends received from the corporation prior to that time and not included, by virtue of Section 67, in computing the incomes of the shareholders by whom they were received.

The above technique has been used in Uganda's Value Added Tax Statute of 1996. For example Section 25(2) of the Statute provides

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> **"where the taxable value is determined under subsection (2) or (3) of section 22, the tax payable is calculated by the formula specified in Section 1(a) of Schedule IV."**

And under Schedule IV, Section 1(a) provides –
"For the purposes of subsection (2) of Section 25 the following formula shall apply

A x B

where, A is the taxable value as determined under subsection (2) or (3) of Section 22; and B is the tax fraction."

There are numerous formulae in the Statute. This method of drafting has eased comprehension. It is also used in other jurisdictions like Australia. The Renton Committee approved of this technique but warned that it shouldn't lead to the use of elaborate mathematical forms of expression "which might do more harm than good". The Statute Law Society also approves of the technique. So long as simple formulae are used, the technique will go a long way to enhancing clarity in expression of tax provisions.

Parliamentary Counsel in other African countries can borrow a leaf from the Ugandan experience.

Legal Research and Consultation

Legislation does not exist in a vacuum. There is usually a policy behind a legislation. Even at policy level the Parliamentary Counsel or draftsperson has a role to play.

Driedger[26] said

> **"It is not the function of a draftsman either to originate or determine legislative policy. But the dividing line between policy and law, between form and substance, is not a sharp one and the draftsman cannot escape being involved in policy discussions. Although the draftsman is not responsible for policy, he must nevertheless consider whether the prescribed policy is capable of implementation. Not all social ills can be cured by legislation, and he must critically examine the policy he has been asked to express in legislative language, not as a draftsman, but as a lawyer."**

In order to express the policy behind a legislation accurately, the Parliamentary Counsel has got to do legal research and carry out consultations. Before drafting any legislation, be it a taxing law or not, counsel must do research to ascertain –

- the state of the existing law before the making of the proposals for a new legislation;

[26] in 'The Composition of Legislataion (1976) at p. xv

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- the mischief and defect for which the existing law did not provide;

- the remedy the Parliament or sponsoring department has resolved to cure the defect or mischief; and

- the true reason for the remedy or proposed law.

Clarity in expression depends on clear thinking. So it is important for a draftsperson or Parliamentary Counsel to thoroughly understand the background for a proposed legislation in order to draft legislation which is not vague or ambiguous.

And for tax legislations which are rather complex, the research must be buttressed by consultations. Counsel must consult departmental officials in order to acquaint himself or herself with the background information on the proposed fiscal legislation.

The Government should always seek the fullest advice from those affected on the problems of implementation and enforcing proposed legislation. Good consultation practice requires that when a bill is being prepared, bodies with relevant experience or interests – particularly those directly affected – should be given all the relevant information and an opportunity to make their views known or to give information or advice, at each level of decision-taking. And the consultation should be as open as possible.

Many of those affected by legislation, and affected very substantially, are never consulted in the process of enacting that legislation, and yet they may have no remedy. Taxation is one of those areas where the people affected – the tax payers – are not usually consulted. It could be argued that they have to pay tax whether they like it or not. But without sensitization, there may be a problem of implementation of a law imposing the tax. However, where a party has a legitimate expectation to be consulted, then the consultation has to be done. In the case of *Council of the Civil Service Unions* v *Minister for the Civil Service*[27] Lord Fraser stated that "legitimate, or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

Consequently, if tax payers have been consulted before prior to introduction of a new tax, they would expect to be consulted and the consultation has to be done before a status quo is altered. In Uganda before 1996, people did not understand much about the Value Added Tax law. The latter was introduced to replace sale tax and commercial transaction levy (CTL) which were user unfriendly and difficult to collect. There was resistance to this new tax and the argument from Ministry of Finance was that the VAT has worked (if at all) in Ghana, so it is also feasible for Uganda. But the fact that a tax has worked in one country does not mean it will work in another. Local circumstances have to be taken into account.

In the Kenyan case of *Nyali Ld* v *Attorney General,*[28] Lord Denning had this to say about the common law:

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[27] [1985] A.C. 374e
[28] (1956) 1 Q.B. 1 at pp 16-17

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> **"…the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending… In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications."**

In the same vain, a fiscal policy may have been successfully applied in one jurisdiction, but before it is transplanted to another jurisdiction, local circumstances have to be scrutinized. The task of making the qualifications is entrusted to Parliamentary Counsel together with the sponsoring department. It is a task that calls for all their wisdom. And sensitization should also be carried out for the success of a new tax legislation.

The Lawyer's Training Needs

It is apparent through reading this paper that legislation should be expressed in language that can be clearly understood. Edmund Burke observed that **bad laws are the worst form of tyranny**. But, equally, well-intentioned laws that are badly drafted or not readily accessible are also a form of tyranny. The citizen who misunderstands, and thus fails to heed the dictates of an ambiguous Act of Parliament is liable to suffer serious consequences. He or she may find himself or herself liable for taxes that proper understanding would have enabled him or her to avoid.

The citizen may suffer financial penalties.

In *Pepper (Inspector of Taxes)* v *Hart*[29] the issue was whether in construing ambiguous or obscure statutory provisions the court should relax the historic rule that the courts must not look at Parliamentary history of legislation or Hansard for the purpose of construing such legislation. At page 51 of the report, Lord Griffiths said:

> **"In my view this case provides a dramatic vindication of the decision to consult Hansard: had your Lordships not agreed to do so the result would have been to place a very heavy burden of taxation on a large number of persons which Parliament never intended to impose."**

Although the ability to draft improves with experience, an aptitude for the work is essential. What makes a good legislative draftsperson is a good basic legal knowledge, a feeling for the proper use of the English language or other language in which legislation is drafted, a critical ability, lots of imagination and plenty of practice. Experience has shown that general legal ability by itself is not sufficient and that a competent lawyer without practical experience in legislative draftmanship cannot perform the craft satisfactorily. Pursuant to the foregoing, it is important **to train lawyers in the skill of legislative drafting** which is different from legal writing.

[29] (1993) 1 All E.R. 42

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As Beaman[30] said,

> **"…the number of contingencies a lawyer has to guard against in the case of a will or contract, while sometimes they are very numerous, are mere fly-specks compared with the contingencies that must be considered in the case of a statute…."**

Lawyers trained and skilled in legislative drafting are few in Africa. And yet there is a need for drafting manpower in each country. Capacity building is essential. The Government needs legislations covering a multiplicity of issues. Laws to enable people have access to land and to encourage financial development are required or need amendment. In most countries in Africa like Uganda, Ghana and Zimbabwe, revision of laws are being undertaken. All these endeavours need lawyers skilled in drafting. So the need for training is urgent.

There are very few institutions in Africa where legislative drafting courses are conducted. In Uganda, the Law Development Centre was established (by Act No. 21 of 1970) to carry out a number of functions. One of them is to organise and conduct courses in legislative drafting. I teach Legislative Drafting at the Law Development Centre which prepares lawyers for legal practice. The Centre has carried out the function of training in legislative drafting since its establishment.

Legislative drafting is also taught at the Ghana School of Law. In Zambia, the Zambia Institute of Advanced Legal Education (ZIALE) was established in 1996 as a body corporate (under Act No. 10 of 1996). Before the above Institute was established, there was the Law Practice Institute set up in 1968. The latter was set up to provide basic training in essentials of legal practice. The functions of ZIALE were widened to provide national, regional and international legal studies, and training in legislative drafting. The Institute conducted the first course in Legislative Drafting in 1998.

The International Law Institute, Kampala, Uganda has conducted so far three courses in Legislative Drafting between October, 1999 and June, 2000. The support of UNITAR (United Nations Institute for Training and Research) in funding for these courses is greatly appreciated. Most participants from eleven (11) countries confessed that although they have been drafting laws, they have never got any legal training in legislative drafting. A participant from Tanzania stated that there is even no Law School in Tanzania. Learning of drafting is on the job. Both the Tanzanian and Rwandan participants were involved in drafting tax legislations!

Outside Africa, Legislative Drafting is taught at Masters level at the University of the West Indies, Cave Hill Campus, Barbados. All these courses need funding for a lawyer to attend.

Lawyers also need training in research skills. The use of computers with internet facilities would go a long way in facilitating research. Training in the use of the computer is essential. A draftsperson's work is eased when he or she types out his or her work in a computer. Alteration of drafts are easily done in the drafting process.

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[30] quoted by Crabble in 'Legislative Drafting' (1993) at p. 7

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As far as tax legislation is concerned, lawyers need training in financial matters. Refresher courses on taxation or revenue law, debt management and fiscal planning would also help. People need to know that taxes are needed for financing government expenditure. Loans and grants have their own problems. Loans are not easy to pay back where countries are always in financial deficiency. Hence taxation is the key. But the imposition of tax should be done with care. Heavy taxation was one of the causes of the renown French Revolution. So the ability of the people to pay must also be considered.

For personal capacity building, a lawyer should practice the use of words, both in writing and by word of mouth. A lawyer should seek to make his or her opinions clear at all costs. Words used in legislations can be a source of ambiguity or vagueness. The meaning of a word may change from decade to decade, from place to place, even from one person to another. It may depend on the subject matter under consideration or the context in which it is used. So a lawyer who wishes to be Parliamentary Counsel has to acquire a command of language and to say what meaning any particular word has in any particular case. Words are the lawyer's tool of trade.

The reason why words are so important is because words are the vehicle of thought. "If others find it difficult to understand you, it will often be because you have not cleared your own mind upon it. Obscurity in thought inexorably leads to obscurity in language".[31]

There is no special language for statutes. Of course every art and science has its own technical terms, designed to express certain meanings with the utmost precision. It is not suggested that the draftsperson should avoid these when he or she is drafting a statute relating to a particular branch of knowledge. Law too, has its own special terms and when occasion requires they must be used. For example, *habeas corpus, consideration, domicile, executor, executrix, testator, testatrix, fee simple* are technical terms but they mean something and when properly used will avoid ambiguity. The best and safest rule for the draftsperson to follow is that words and sentences should be as short and simple as circumstances permit.

An understanding of the principles of grammar is absolutely necessary. The language of legislation may be peculiar but it need not be.

Legislative drafting does not have its own peculiar rules of grammar or of syntax.[32] When drafting law, Parliamentary Counsel should stick to plain words and grammar and a construction as simple as the subject matter permits. Counsel must also be conversant with the structure of the sentence. The arrangement of words should be such that there is no ambiguity.

[31] per Lord Denning in "The Discipline of Law" Butterworths (1978) at p. 5
[32] per Crabbe, 'Legislative Drafting' 1993 at p. 6

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Training is needed to acquire the art of legislative drafting. "According to Driedger it takes about ten years to train a competent Parliamentary Counsel. One can learn all the rules of swimming but that does not make one a swimmer, one has to get into the water. That is where the test is."[33] So upon training, one needs to practice the art of legislative drafting.

CONCLUSION

The efficacy and maintenance of the rule of law, which is the foundation of any Parliamentary democracy, has at least two pre-requisites. First, people must understand that it is in their interests, as well as in that of the community as a whole, that they should live their lives in accordance with all the rules. Second, they must know what those rules are. Laws are written for persons of average intelligence and education who have an interest in or knowledge of the subject matter of the law. A tax statute – is directed to the public at large, especially the tax paying group, revenue officers, lawyers and judges. Certainly, it is important that the persons to whom a statute or portion of a statute is directed should be able to understand it; perhaps not to the finest nuance, but they should be able to grasp the gist of it.

The task of reducing policy to words that can be understood is on the draftsperson. That task calls for training; for legislation should not be drafted in such a way that its purpose is defeated and neither should laws unduly infringe on fundamental human rights.

[33] per Crabbe, *ibid*

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PROFILE OF THE AUTHOR

Florence N. DOLLO is a holder of a LLB (Honours) Degree from Makerere University, Kampala-Uganda obtained in 1990. She obtained a Diploma in Legal Practice from the Law Development Centre in 1991. She also has a Masters of Law (LLM, Legislative Drafting) with a distinction in Legislative Drafting and Research obtained at the University of the West Indies, Barbados in 1998.

She has been practising law in Uganda since 1992. She is also a Lecturer at Law Development Centre teaching Legislative Drafting, Family Law, Criminology, Penology and Criminal Law. She has written a number of papers on the above subjects and is a consultant on Legislative Drafting. As a consultant she has trained clerks and Research Assistants for the Parliament of Uganda, members of the Tax Appeals Tribunal and Land Tribunals, State Prosecutors and also trained lawyers at the International Law Institute, Kampala-Uganda. She has also drafted laws like the National Forestry Authority Bill, 2000.

She is also a law practitioner and partner in a firm of advocates. She is a member and vice chair person of the National Organisation for Civic Education and Election Monitoring, member of FIDA womens law association counselling clients, rural legal education and human rights, and a member of the Uganda Law Society of which she is a legal practitioner. She has also been faculty at the International Law Institute and also at Police Training School in Kampala. Ms Dollo has written several publications and papers on various law topics.

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UNITAR is an autonomous body within the United Nations which was established in 1965 to enhance the effectiveness of the UN through appropriate training and research. UNITAR's programmes in the legal aspects of debt, financial management and negotiation are among a wide range of training activities in the field of social and economic development and international affairs carried out, generally, at the request of governments, multilateral organizations, and development cooperation agencies. UNITAR also carries out results-oriented research, in particular research on and for training, and develops pedagogical materials including distance learning training packages.

UNITAR's **Training and Capacity Building Programmes in the Legal Aspects of Debt, Financial Management and Negotiation** are conducted for the benefit of over 35 partner countries mainly from sub-Saharan Africa and Vietnam. These programmes aim at meeting the priority training needs of senior and middle-level government officials through a wide range of seminars, workshops, and training of trainers workshops. In parallel to training activities, the programme also assists in strengthening local capacities of governmental and academic institutions through distance learning training packages, up-to-date publications as well as networking activities.

During 2001, the programme will focus on:

- Training government officials through short-duration regional seminars and workshops on various aspects of debt, financial management and negotiation;
- Developing On-line Training Courses (in parallel with its traditional regional training) with a view to tapping a wider audience and reducing cost of training per participant;
- Strengthening existing ties with regional training centres and offering joint courses with partners in the field;
- Creating awareness among senior government officials of the importance of the legal aspects in the borrowing process and of putting together a multidisciplinary team for loan management and public administration;
- Providing in-depth training and skills development for accountants, economists, financial experts and lawyers coming from government ministries and departments involved in negotiation, financial management and public administration; and
- Developing and disseminating training packages and 'best practice' materials directly related to the practicalities of legal aspects of debt and financial management, with a view to strengthening existing human resources and institutional capacities at the national level.

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